

## EMPLOYER LIABILITY FOR SUPERVISOR HARASSMENT AFTER *ELLERTH* AND *FARAGHER*

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### INTRODUCTION

In recent years, the law of sexual harassment under Title VII has been evolving at an exhausting pace. The amount of development in Title VII case law is due as much to the sheer number of sexual harassment suits as to the relative lack of guidance from the Supreme Court in this area.<sup>1</sup> However, in its most recent term, the Supreme Court granted certiorari in an unprecedented number of sexual harassment cases.<sup>2</sup> The Court's willingness to review so many sexual harassment issues signaled its interest in, and the need for, defining and shaping the contours of this area of the law.

While its twin decisions in *Burlington Industries, Inc. v. Ellerth*<sup>3</sup> and *Faragher v. City of Boca Raton*<sup>4</sup> do some defining and shaping, the Court has refrained from giving interested employers a reasonable, bright line test for avoiding liability. Nevertheless, these decisions represent both clarifications and changes in the law of sexual harassment. This article explores the Court's holdings in *Ellerth* and *Faragher* and explains the ramifications of these decisions from an employer's perspective.

The article begins with an analysis of the law of sexual harassment and employer liability pre-*Ellerth* and *Faragher*. Part II summarizes both the factual and legal underpinnings of *Ellerth* and *Faragher* and begins to explore the change in the law that those decisions represent. Part III discusses the impact that these decisions will have on an employer's liability under Title VII as well as on an

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1. See Kirstin Downey Grimsley, *Worker Bias Cases Are Rising Steadily; New Laws Boost Hopes for Monetary Awards*, WASH. POST, May 12, 1997, at A1. The number of Equal Employment Opportunity Commission ("EEOC") complaints alleging sexual harassment has more than doubled in the past six years. The number of complaints rose from 6,127 in 1990 to 15,342 in 1996. See *id.*

2. See Kathryn Abrams, *Postscript, Spring 1998: A Response to Professors Bernstein and Franke*, 83 CORNELL L. REV. 1257, 1257 (1998) ("The four [sexual harassment cases] on the docket comprise twice as many as the Court has decided in the history of the claim.") .

3. 118 S. Ct. 2257 (1998).

4. 118 S. Ct. 2275 (1998).

employer's efforts to limit its liability. Part IV explores some of the questions that remain unanswered in the wake of these decisions. This article will ultimately conclude that while the *Ellerth* and *Faragher* rulings certainly change the analysis of a sexual harassment claim and the scope of an employer's liability, they are unlikely to significantly impact an employer's attempts to limit its exposure to sexual harassment suits.

# I. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT BEFORE *ELLERTH* AND *FARAGHER*

The law of sexual harassment has its genesis in Title VII of the Civil Rights Act of 1964.<sup>5</sup> Title VII prohibits discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."<sup>6</sup> Although the statute does not expressly prohibit harassment, the courts eventually came to view sexual harassment as a form of sex discrimination.<sup>7</sup>

Having recognized harassment as a form of discrimination, the courts were presented with several problems of interpretation. Necessarily, the first of these issues involved defining the conduct which constitutes harassment. Initially, sexual harassment was narrowly defined as only actual demands for sexual favors.<sup>8</sup> It is now more broadly defined, with certain important qualifications, to include any unwanted term or condition imposed on an individual's employment because of unwelcome conduct of a sexual nature.<sup>9</sup> This issue is by no means settled, and courts, including the Supreme Court, continue to further de-

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5. See 42 U.S.C. § 2000e-2(a)(1)(1989). The Civil Rights Act of 1964 was amended by the Civil Rights Act of 1991, which granted plaintiffs a right to a jury trial and provided for the recovery of emotional distress and punitive damages. See 42 U.S.C. § 1981a(1), (b)(1), (b)(3) (1994).

6. *Id.* The same standards which apply to sexual harassment claims apply to harassment claims based on these other characteristics as well. See, e.g., *Gotfryd v. Book Covers, Inc.*, No. 97 C 7949, 1999 U.S. Dist. LEXIS 235, at \*16-17 (N.D. Ill. Jan. 6, 1999) (noting that the standard of liability established in *Ellerth* and *Faragher* controls national origin discrimination cases); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481 (S.D.N.Y. 1998) (applying the Supreme Court's decisions in *Ellerth* and *Faragher* to plaintiff's claim of a hostile environment based on national origin); *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (applying *Ellerth* and *Faragher* to a racially hostile environment claim).

7. See *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (recognizing sexual harassment as a form of discrimination on the basis of sex). Having concluded that racial harassment was just another form of discrimination imposed on employees because of their race, the Court reasoned that harassment because of an employee's sex was just another form of discrimination because of sex. See *id.* at 658. It was a phantom leap, however, to conclude that sexual harassment, or harassment of a sexual nature, by itself, was just another form of sex discrimination. Harassing someone because they are male or female is not the same as harassing them "sexually". The distinction was blurred and made irrelevant by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

8. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979) ("Sexual harassment, most broadly defined, refers to unwanted imposition of sexual requirements in the context of a relationship of unequal power.").

9. See LINDEMANN & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 745 (1996) (defining sexual harassment as "the imposition of an unwanted condition on a person's employment because of that person's sex").

fine the conduct which is actionable under Title VII.<sup>10</sup>

As the early case law developed, two basic classifications of sexual harassment emerged: (1) quid pro quo harassment and (2) hostile work environment harassment. The essence of a quid pro quo harassment claim is an individual's<sup>11</sup> reliance upon his<sup>12</sup> actual or apparent authority to extort or attempt to extort sexual favors from another employee by conditioning work-related benefits on sexual favors.<sup>13</sup> To be actionable, the plaintiff must show that a term or condition of her employment was linked to her acceptance or rejection of sexual advances.<sup>14</sup> A claim for hostile work environment harassment, in contrast, requires a showing that the workplace was permeated with "discriminatory intimidation, ridicule and insult."<sup>15</sup> A hostile work environment is actionable only if the conduct is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."<sup>16</sup>

In addition to defining prohibited conduct, courts were faced with the task of determining the situations in which an employee's harassing conduct would be imputed to the employer for purposes of assigning liability.<sup>17</sup> Title VII does not provide for individual liability.<sup>18</sup> Even if it did, the deep pocket defendant is typically the employer and not individual agents, co-employees or supervisors. Consequently, establishing employer liability for sexual harassment, or avoiding

10. In many ways, the definition of sexual harassment is expanding. For example, in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), also decided this term, the Supreme Court held that same-sex sexual harassment is prohibited by Title VII. In other ways, however, the definition may be contracting. In *Oncale*, the Court emphasized the requirement that sexual harassment be "severe and pervasive" in order to be actionable and noted that Title VII is not meant as a "general civility code." *Id.*, at 1002, 1003.

11. See *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994).

12. This article often refers to the harassed employee as female and the harasser as male. This convenience reflects the gender configuration of the vast majority, but admittedly not all, reported and unreported claims.

13. See LINDEMANN & GROSSMAN, *supra* note 9, at 759 & n.77. The EEOC Guidelines define quid pro quo harassment as: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. . . ." 29 C.F.R. § 1604.11(a) (1985).

14. See LINDEMANN & GROSSMAN, *supra* note 9, at 759 & n.77.

15. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks and brackets omitted). The EEOC Guidelines define a hostile environment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a). The Supreme Court endorsed the EEOC's formulation of hostile environment claims in *Meritor*. See 477 U.S. at 65.

16. *Meritor*, 477 U.S. at 67.

17. See *id.* at 72 (recognizing that the issue of employer liability remains to be resolved).

18. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (holding that "individual defendants may not be held personally liable under Title VII"); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 588 (9th Cir. 1993) (holding that "there is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress"); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1991) (holding that "individuals who do not otherwise qualify as an employer cannot be held liable for a breach of Title VII"). Many state fair employment statutes do, however, impose individual liability for sexual harassment. See, e.g., N.Y. EXEC. LAW § 296(1)(a) (1993).

it, is critical for the advocates, from both a practical and a legal standpoint.

*Meritor Savings Bank v. Vinson* presented the Court with its first opportunity to comment on the issue of employer liability for sexual harassment.<sup>19</sup> In *Meritor*, the plaintiff, a bank teller, claimed that her supervisor had made sexual advances towards her over a period of four years.<sup>20</sup> According to the plaintiff, her supervisor, Taylor, once followed her into the restroom and fondled and exposed himself to her.<sup>21</sup> The plaintiff also testified at her deposition that Taylor suggested they have sexual relations and that she feared losing her job if she refused.<sup>22</sup> The plaintiff admitted to having had sex 40 or 50 times with Taylor over the course of several years.<sup>23</sup> The plaintiff claimed she never reported Taylor's conduct because she feared reprisal.<sup>24</sup>

The District Court dismissed the complaint, finding no liability on the part of the employer since it lacked notice of the misconduct.<sup>25</sup> The Court of Appeals reversed, finding that the plaintiff stated a claim of hostile work environment harassment and further held that an employer is absolutely liable for a hostile work environment created by its supervisors.<sup>26</sup>

The Supreme Court granted certiorari and for the first time endorsed the notion that hostile work environment claims were in fact actionable discrimination under Title VII.<sup>27</sup> However, the Court expressly declined to decide the issue of employer liability for such claims.<sup>28</sup> Instead of stating a definitive rule, the Court, in dicta, issued a general endorsement of the application of agency principles, stating that "Congress wanted courts to look to agency principles for guidance in this area."<sup>29</sup> In the next sentence, however, the Court muddled the waters by declaring that agency principles "may not be transferable in all their particulars to Title VII" and that Congress' use of the word "agent" in its definition of "employer" in Title VII indicated its intent to limit an employer's liability for the acts of its employees.<sup>30</sup> The Court gave no guidance regarding precisely how courts should define the limits of that liability.

In the wake of the Court's less than clear dicta in *Meritor*, the lower courts attempted to interpret the extent to which agency principles should govern employer liability under Title VII. Employer liability for quid pro quo harassment

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19. 477 U.S. 57 (1986).

20. *See id.* at 60.

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 62.

26. *See id.* at 63.

27. *See id.* at 64-67. Specifically, the Court found that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," including requiring a person to work in a discriminatory hostile or abusive work environment. *Id.* at 64 (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). In so holding, the Court endorsed the EEOC Guidelines describing the conduct which constitutes a hostile work environment. *See id.* at 65.

28. *See id.* at 72.

29. *Id.*

30. *Id.*

proved to be the easier analysis. Because quid pro quo harassment was necessarily perpetrated by a supervisor, courts held employers strictly liable for quid pro quo harassment, reasoning that the supervisor's invocation of his authority gives rise to vicarious liability.<sup>31</sup> Moreover, the employer remained liable even though higher level supervisory or managerial employees of the employer were unaware of the harassment.<sup>32</sup>

The courts did not, however, apply agency principles to hostile environment claims with a similar degree of clarity or consistency. In the years following *Meritor*, the jurisdictions developed varying tests and, to some extent, varying theories for supervisor liability.<sup>33</sup> Generally speaking, courts analyzed employer liability for supervisor harassment under theories based on respondeat superior, apparent authority, negligence, or some combination thereof.<sup>34</sup>

Although several courts initially explored agency doctrines such as respondeat superior and apparent authority, few courts actually found employers liable under these principles.<sup>35</sup> This almost universal result is relatively easily explained; courts reasoned that there could be no respondeat superior liability for sexual harassment because sexual harassment was not within the scope of a supervisor's actual authority.<sup>36</sup> Likewise, only a few courts concluded that a supervisor had the apparent authority to engage in sexual harassment.<sup>37</sup> This was especially true where the employer had a sexual harassment policy in place.<sup>38</sup>

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31. See Glen Allen Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability For a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1060 (1995) ("The rationale supporting this rule recognizes that when the employer gives its supervisors the authority to fire employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority").

32. See LINDEMANN & GROSSMAN, *supra* note 9, at 776.

33. See Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1234 (1991).

34. See LINDEMANN & GROSSMAN, *supra* note 9, at 812-21.

35. In fact, a good case has been made for the notion that the courts were not truly applying agency principles at all. See generally David Benjamin Oppenheimer, 81 CORNELL L. REV. 66 (1995) (arguing that, prior to the Supreme Court's decisions in *Faragher* and *Ellerth*, courts imposed employer liability on the basis of negligence even though they spike in terms of agency principles); Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeled the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817 (1994) (arguing that respondeat superior is a misnomer for the standard of liability in sexual harassment cases); see also *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-65 (7th Cir. 1990) (Posner, J.) (criticizing the use of the term "respondeat superior" in Title VII cases since the standard as applied was actually one of negligence).

36. See, e.g., *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (holding that a reasonable person could not conclude that a supervisor had the employer's consent to harass where the employer had a policy prohibiting harassment); *Salley v. Petrolane, Inc.*, 764 F. Supp. 61, 63 (W.D.N.C. 1991) (holding employer was not vicariously liable where manager's actions were not sanctioned by employer); *Parks v. Hayward's Pit*, No. 93-2387-JWL, 1993 WL 545231 at \*3 (D. Kan. 1993) (holding that an employer was not liable under a theory of respondeat superior because a supervisor's demands for oral sex were not in furtherance of the employer's business).

37. See, e.g., *Watts v. New York City Police Dep't*, 724 F. Supp. 99 (S.D.N.Y. 1989).

38. See *Gary*, 59 F.3d at 1398 (holding that a reasonable person could not conclude that a supervisor had the employer's consent to harass where the employer had a policy prohibiting harassment); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993) (holding that employers were not liable where they took immediate action to stop harassment upon notification).

Consequently, employers were relatively insulated from vicarious liability claims for a supervisor-created hostile work environment.<sup>39</sup>

Given the ineffectiveness, from a plaintiff's standpoint, of agency theories, the most common basis for imposing employer liability for supervisory conduct proved to be some form of negligence.<sup>40</sup> While the tests that emerged were not uniform, the courts generally required a showing that the employer knew or should have known of the supervisor's misconduct and failed to act reasonably to correct it. For example, in *Kauffman v. Allied Signal*, the Sixth Circuit held that liability for a supervisor's harassment involved determining whether the supervisor's harassing conduct fell within the scope of his employment or was foreseeable *and* whether the employer acted promptly and reasonably in eliminating the conduct once it became aware of the harassment.<sup>41</sup> Thus, an employer avoided liability by demonstrating that its response to the harassment was reasonable and adequate.<sup>42</sup> Similarly, the Ninth Circuit established a standard for supervisor harassment which imposed liability where the employer failed to "remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."<sup>43</sup> Thus, the liability analysis was made fairly simple—much like analyzing liability on a property owner's part for damage caused by a defect on the property in a slip and fall case or a bite from by the owner's dog.

Not content with this simple rule, the Second Circuit developed a liability scheme which differentiated between low- and high-level supervisors. As a general rule, an employer escaped liability in the Second Circuit for the hostile environment harassment of a low-level supervisor by taking effective remedial action after learning about the harassment.<sup>44</sup> No such defense was available, however, where the harasser occupied a "sufficiently high level in the company's hierarchy."<sup>45</sup> In those cases, strict agency principles controlled, and the employer remained liable even if it promptly corrected the harassment after receiving notice.<sup>46</sup>

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39. This was not always the case with high-level supervisors. For example, the Second Circuit imposed vicarious liability for a hostile work environment created by a supervisor if that supervisor occupied a sufficiently high position in the company's hierarchy. See *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997).

40. See LINDEMANN & GROSSMAN, *supra* note 9, at 815 (discussing at length the application of respondeat superior, apparent authority, and negligence and concluding that the negligence standard is applied most commonly).

41. 970 F.2d 178 (6th Cir. 1992); see also *Yates v. Avco Corp.*, 819 F.2d 630, 634-35 (6th Cir. 1987) (holding that an employer has a duty to respond adequately to harassment).

42. See *Yates*, 819 F.2d at 634.

43. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1512 (9th Cir. 1989) (dealing with religious discrimination).

44. See *Torres v. Piscano*, 116 F.3d 625 (2d Cir. 1997). This rule assumes that the supervisor did not invoke his actual or apparent authority to perpetuate the harassment. In those cases, liability was automatic under agency guidelines. See *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (holding an employer automatically liable under agency law on a hostile environment claim for harassment of employee by supervisor).

45. *Torres*, 116 F.3d at 634-35.

46. See *id.* The line delineating a supervisor of "sufficiently high level" proved difficult to draw. However, courts generally required that an employee occupy a management level position

In sum, the standard of employer liability for supervisor harassment under Title VII in the years after *Meritor* depended, in part, upon whether the conduct was classified as quid pro quo or hostile environment harassment. While liability for quid pro quo harassment was automatic, liability for hostile environment harassment generally depended upon a finding that the employer knew or should have known of the harassment.<sup>47</sup> Moreover, in hostile work environment cases, even if the employer's preventative measures proved unsuccessful, liability could still be avoided with effective remedial measures after the harassment came to light.<sup>48</sup>

This, then, was the 'lay of the land' of employer liability for harassment in the years following the Supreme Court's decision in *Meritor*. For more than a decade following *Meritor*, the law developed more or less in accordance with the general principles and underlying assumptions discussed above, and courts, attorneys, and employers alike oriented themselves to the contours of that landscape. However, the Supreme Court drastically altered this familiar scene when it announced its "new rule" of liability in *Ellerth* and *Faragher*. With this as background, this discussion now turns to the impact of the Court's recent rulings on the employer liability landscape.

## II. THE NEW LAW OF SEXUAL HARASSMENT: *ELLERTH* AND *FARAGHER*

In the first of the Court's twin decisions, *Burlington Industries, Inc. v. Ellerth*, the plaintiff, Kimberly Ellerth, worked as a salesperson in a division of Burlington Industries ("Burlington").<sup>49</sup> Ellerth alleged that she had been sexually harassed by Ted Slowik, a mid-level manager with the authority to hire and make promotion decisions subject to the approval of his supervisor.<sup>50</sup> Slowik was not considered a member of upper-level management and had no policy making authority.<sup>51</sup> "Slowik was not Ellerth's immediate supervisor."<sup>52</sup> Instead, Ellerth answered to her supervisor who in turn answered to Slowik.<sup>53</sup>

Ellerth alleged that Slowik engaged in a course of conduct which included sexually charged remarks, such as comments about her breasts, the length of her skirts and instructions to "loosen up".<sup>54</sup> Ellerth further alleged that on at least three occasions Slowik made remarks which she interpreted as threats to deny

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before automatic liability (i.e., vicarious liability) would be imposed. See *id.*

47. The same is not necessarily true of liability under state fair employment statutes. For example, in New York, the conduct, even if of the quid pro quo variety, must be shown to have been condoned by the employer. See *SUNY at Albany v. State Human Rights Appeal Bd.*, 81 A.D. 2d 688 (N.Y. App. Div. 1981).

48. See *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) ("[A] plaintiff must prove that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it").

49. See 118 S. Ct. 2257, 2262 (1998).

50. See *id.* at 2262.

51. See *id.*

52. *Id.*

53. See *id.*

54. *Id.*

her tangible job benefits.<sup>55</sup>

The first of these incidents occurred during a business trip when Slowik invited Ellerth to the hotel's lounge, told her to "loosen up", and informed her that he could make her life "very hard or very easy at Burlington."<sup>56</sup> On another occasion, Slowik expressed reservations about Ellerth during a promotion interview because she was not "loose enough" and then reached over to rub her knee.<sup>57</sup> Although Slowik gave Ellerth the promotion, when he called to announce his decision, he told Ellerth that she would be working with men who "like women with pretty butts/legs."<sup>58</sup> The final incident occurred when Ellerth called Slowik for his permission to insert a customer's logo on a fabric sample.<sup>59</sup> Slowik told Ellerth he only had time to speak with her if she would tell him what she was wearing.<sup>60</sup> When Ellerth called Slowik back a short time later, he asked whether she had begun wearing shorter skirts "because it would make [her] job a whole heck of a lot easier."<sup>61</sup> Ellerth quit soon thereafter.<sup>62</sup> Although Ellerth knew that Burlington had a sexual harassment policy, she never made a complaint or informed anyone of Slowik's objectionable conduct.<sup>63</sup>

Ellerth filed suit claiming that she had been constructively discharged in violation of Title VII.<sup>64</sup> The District Court granted Burlington's motion for summary judgment on the ground that Burlington neither knew nor should have known of Slowik's conduct.<sup>65</sup> The Seventh Circuit Court of Appeals reversed in a decision that produced eight opinions.<sup>66</sup> Although the judges agreed that Burlington could be held liable on a theory of vicarious liability even without a showing of its own negligence, the Court split on the rationale for such a holding.<sup>67</sup> The Supreme Court granted certiorari to resolve the confusion regarding the standard for employer liability under Title VII.<sup>68</sup>

The Court began its analysis with a discussion of the concepts of hostile work environment and quid pro quo harassment. The Court noted that in the years following its acknowledgment of the two theories in *Meritor* the hostile en-

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55. *See id.* As the Court noted, Ellerth based her complaint on such allegations in an effort to establish quid pro quo harassment in order to invoke strict employer liability. *See id.* at 2271.

56. *Id.*

57. *See id.*

58. *Id.*

59. *See id.* at 2262.

60. *See id.*

61. *Id.*

62. *See id.*

63. *See id.*

64. *See id.* at 2263.

65. *See id.*

66. *See id.*

67. *See id.* The reason for the divergent opinions was the judges' disagreement as to the applicable standard for imposing employer liability. Certain judges determined that Burlington was liable because the plaintiff had stated a claim for quid pro quo harassment. Others found that vicarious liability applied even absent facts sufficient to establish a quid pro quo claim. Still other judges concluded that Burlington could be liable only for its own negligence. *See id.*

68. *See id.* at 2264.



vironment/quid pro quo dichotomy had acquired a significance all its own.<sup>69</sup> In particular, employer liability had come to turn on whether the harassment was of the hostile environment or quid pro quo variety.<sup>70</sup> The Court found this result unwarranted by the text of Title VII.<sup>71</sup> Specifically, the Court noted that the terms “quid pro quo” and “hostile work environment” do not appear in the statutory text.<sup>72</sup> The Court went on to observe that these terms, which had come to be determinative on the issue of employer liability, first appeared in academic literature and later “found their way” into court decisions.<sup>73</sup>

The appropriate role for the hostile work environment/quid pro quo analysis, the Court clarified, is merely in determining whether a plaintiff has proved conduct which violates Title VII.<sup>74</sup> Once a plaintiff has demonstrated that she was subjected either to quid pro quo harassment or to a hostile work environment sufficiently severe and pervasive to be actionable, the question of employer liability arises and the classifications of hostile environment/quid pro quo analysis have no further applicability.<sup>75</sup> Thus, the Court announced, once harassment is established, principles of vicarious liability, and not the labels of hostile environment and quid pro quo, control.<sup>76</sup>

The Court then turned to the task of applying agency principles in the context of Title VII, the very task which had caused the lower courts such consternation.<sup>77</sup> The Court began with the premise that sexual harassment presupposes intentional conduct.<sup>78</sup> Under the common law, the Court noted, an employer is vicariously liable for an employee’s intentional torts if committed “within the scope of his or her employment.”<sup>79</sup> An act is “within the scope of employment” if its commission in some way benefits the employer.<sup>80</sup> The Court easily concluded, as other courts had previously,<sup>81</sup> that this theory of vicarious liability would not support employer liability because sexual harassment in no way serves the employer.<sup>82</sup> The Court also concluded that apparent authority is inappropriate in the Title VII context because a supervisor’s harassment will generally result from the exercise of his actual authority, not a false impression of authority.<sup>83</sup>

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69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* at 2264.

73. *See id.*

74. *See id.* at 2265.

75. *See id.*

76. *See id.*

77. *See supra* Section I.

78. *See Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2266 (1998).

79. *Id.*

80. *See id.*

81. *See, e.g., Parks v. Hayward’s Pit*, No. 93-2387-JWL, 1993 WL 545231 at \*3 (D. Kan. 1993).

82. *See Ellerth*, 118 S. Ct at 2267.

83. *See id.* at 2268. The Court stated that this proposition would hold true in the usual case. However, the Court suggested that liability could lie under an apparent authority theory in the “unusual case” where the plaintiff mistakenly but reasonably believed that an employee had supervisory authority. *Id.*

Having rejected the applicability of these theories of vicarious liability in the sexual harassment setting, the Court determined that the appropriate theory of employer liability under Title VII was to be found within the “aided in the agency relation standard.”<sup>84</sup> The “aided in the agency relation standard” provides that a principal is subject to vicarious liability if its agent is aided in the wrongful conduct by the existence of the agency relation itself.<sup>85</sup> The Court noted, however, that a literal application of this agency standard would almost always impose liability since the supervisor would be aided in committing the harassment merely by virtue of his proximity and regular contact with the victim.<sup>86</sup> Thus, the Court reasoned, such an application would create a de facto rule of strict liability—the very result the Court was seeking to avoid.<sup>87</sup> Therefore, the Court created a new test for determining supervisory liability which turns on whether a tangible employment action is taken.<sup>88</sup> The new test was described as follows:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.<sup>89</sup>

Since the parties had focused their arguments and analysis on the no longer controlling hostile work environment/quid pro quo classifications, the Court remanded the case without applying this new standard.<sup>90</sup>

*Faragher v. City of Boca Raton*,<sup>91</sup> the second of the twin decisions, provided the Court with its first opportunity to apply the employer liability test articulated in *Ellerth*. In *Faragher*, the plaintiff claimed that two of her supervisors created a hostile environment while she worked part-time as a lifeguard in the City of Boca Raton's Marine Safety Section.<sup>92</sup> Specifically, the plaintiff, Beth Ann Faragher, alleged that she had been subjected to offensive touching and lewd

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84. *Id.*

85. *Id.*

86. *See id.*

87. *See id.*

88. *See id.* The Court noted that, if mere proximity and contact were sufficient, “an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment, a result enforced by neither the EEOC nor any court of appeals to have considered the issue.” *See id.* at 2268 (citations omitted).

89. *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

90. *See id.* at 2271.

91. *See* 118 S. Ct. 2275 (1998).

92. *See id.* at 2280.

remarks about women and that her immediate supervisor once told her: “Date me or clean toilets for a year.”<sup>93</sup> The City had a sexual harassment policy but never disseminated it among its Marine Safety employees.<sup>94</sup> Faragher never complained about the conduct to the City’s supervisors, and she eventually resigned.<sup>95</sup>

The District Court had previously determined that Faragher’s allegations rose to the level of actionable harassment.<sup>96</sup> However, Faragher did not suffer any tangible employment action, and, ordinarily, the City would have been entitled to raise its affirmative defense to liability.<sup>97</sup> However, in this case, the Court found that the defense was unavailable to the City as a result of its failure to disseminate its sexual harassment policy or to monitor the activities of its supervisors.<sup>98</sup> The Court held that given these failures, the City could not, as a matter of law, it had taken reasonable care in preventing the harassment.<sup>99</sup> Consequently, the Court found the City vicariously liable.<sup>100</sup>

### III. EMPLOYER LIABILITY AFTER *ELLERTH* AND *FARAGHER*

The decisions in *Ellerth* and *Faragher* impact the law of sexual harassment in several significant ways. Specifically, the decisions affect the analysis of a sexual harassment case as well as the scope of an employer’s liability. However, as explained more fully below, the decisions are not likely to radically change an employer’s approach to sexual harassment in the workplace.

#### A. The New Analysis

*Ellerth* and *Faragher* will have a significant impact on the analysis of a Title VII case. At the outset, it should be noted that the decisions do not impact an employer’s liability for sexual harassment perpetrated by a coworker or a third party.<sup>101</sup> The decisions only deal with employer liability for supervisor harassment.<sup>102</sup> Moreover, these two decisions do not directly impact the initial determination as to whether conduct is actionable.<sup>103</sup> Both *Ellerth* and *Faragher* address the issue of employer liability for conduct after it has been found to be actionable as either quid pro quo or hostile environment harassment.<sup>104</sup>

Beyond these disclaimers, the decisions’ impact on a court’s analysis of em-

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93. *Id.*

94. *See id.* at 2280-81.

95. *See id.* at 2281.

96. *See id.* at 2293.

97. *See id.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2265 (1998); *Faragher*, 118 S. Ct. at 2291.

102. *See Faragher*, 118 S. Ct. at 229.

103. *See Ellerth*, 118 S. Ct. at 2265 (noting that while terms “quid pro quo” and “hostile work environment” no longer control supervisor liability, they remain probative on the issue of whether conduct is actionable under Title VII).

104. *See id.* at 2265; *Faragher*, 118 S. Ct. at 2292-93.

ployer liability, as well as on an employer's calculation of its liability risk, is significant. The analysis will no longer focus on whether the harassment is characterized as hostile work environment or quid pro quo harassment, but will instead focus on whether the plaintiff has suffered a tangible job detriment. Where the plaintiff demonstrates a tangible job detriment, the employer's liability is automatic.<sup>105</sup> Where there has been no tangible job detriment, the employer may avoid liability by successfully asserting the affirmative defense.<sup>106</sup> Thus, these decisions require courts, once a determination is made that the conduct is actionable, to shift their focus from the quid pro quo/hostile work environment classification to the presence or absence of a tangible job detriment.<sup>107</sup> Given the overwhelming importance of the presence or absence of a tangible job detriment, the way in which the definition of this term is construed by the lower courts will be critical to an employer's liability.<sup>108</sup>

In essence, this new analysis changes which end of the sexual harassment spectrum is examined in order to determine employer liability. It used to be that the fact-finder evaluated the alleged sexually harassing conduct by categorizing the type of sexual conduct that had been committed, either as quid pro quo or hostile environment.<sup>109</sup> Thus, fact-finders looked at the type of harassment or the cause of the injury to determine how to analyze employer liability.<sup>110</sup> Just as practitioners and judges were beginning to master this analysis, the Supreme Court, through *Ellerth* and *Faragher*, has taken the focus off the type of harassment, and instead placed it on the ultimate impact, or effect, of the conduct, i.e., the presence or absence of a tangible job detriment.<sup>111</sup> The focus for determining an employer's liability for supervisor conduct is no longer on the nature or seriousness of the sexually harassing conduct, but rather on whether there is a material, negative change in the employment status of the alleged victim.<sup>112</sup> Thus, the new approach takes the past 13 years of "cause and effect" analysis for determining employer liability for supervisory conduct and stands it on its head with

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105. See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

106. See *Faragher*, 118 S. Ct. at 2292-93.

107. It should be noted that a tangible job detriment sufficient to deprive the employer of the affirmative defense must necessarily be imposed by the harasser. Thus, an employer retains its affirmative defense even if the plaintiff has been terminated, laid-off or demoted so long as the harasser was not the decision-maker. Any other result would not satisfy the aided in the agency relation standard. Further, the harassment itself must "culminate" in the employment action. Therefore, in spite of the presence of a hostile environment and a tangible employment action, there must be a causal connection between the two activities. If the tangible employment action occurred for reasons other than sexual harassment, it is not a "tangible employment action" for purposes of this analysis. See *Ellerth*, 118 S. Ct. at 2270-71.

108. *Ellerth* offers a preliminary definition: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 118 S. Ct. at 2268.

109. See *supra* Section I.

110. See *supra* Section I.

111. See *Ellerth*, 118 S. Ct. 2257, 2265 (1998) (holding that agency law principles concerning scope of employment, negligence, and the agency relation standard, "not the categories *quid pro quo* and hostile work environment," will be controlling on the issue of vicarious liability).

112. See *id.* at 2264-65.

the new “effect and cause” formula.<sup>113</sup>

It is not at all clear that the new analysis is either logical or practical. In other areas of the law, an inquiry which focuses on the type of harm the plaintiff has sustained (or the effect of the defendant’s actions) is reserved for the calculation of damages, not an initial determination of liability. Moreover, this type of analysis seems contrary to the purposes of Title VII. The Civil Rights Act of 1991 was passed, in part, to provide damages so that a plaintiff, such as Anita Hill, could recover in a hostile work environment case even though she suffered no tangible job detriment.<sup>114</sup> However, under the new analysis, an employer can escape liability in an Anita Hill type case by offering an affirmative defense, thereby defeating what appeared to be one of the goals of the Civil Rights Act of 1991.<sup>115</sup>

In addition, by no longer focusing on the conduct, but rather on what may be the purely fortuitous presence or absence of a tangible job detriment, the question becomes whether this is the best way to encourage compliance with Title VII or to compensate a victim of sexual harassment. Under the new analysis, an employer can escape liability for outrageous sexual harassment by a supervisor if there is no tangible job detriment or if a job benefit has been conferred. On the other hand, less serious misconduct which happens to be coupled with a tangible job detriment can result in employer liability.

Given these observations, the new analysis dictated by *Ellerth* and *Faragher* is difficult to justify. It inverts traditional legal analysis and does little to encourage voluntary compliance or to achieve just compensation. The law and litigants would have been better off had the Court not forsaken negligence principles in favor of agency principles which are inherently incompatible with employer liability in this area of the law.<sup>116</sup> In any event, being forced to play the cards we have been dealt, we now turn to some of the anticipated effects of these decisions.

## B. An Expanded Scope of Liability

The *Ellerth* and *Faragher* decisions expand the scope of potential liability in several ways. An employer’s liability no longer depends upon a finding that it

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113. See *id.*

114. Senator Kennedy, in attempting to justify Anita Hill’s failure to complain about the alleged behavior of Clarence Thomas for several years, pointed out the lack of any incentive for plaintiffs in sexual harassment cases when they suffer no tangible, economic harm. Senator Kennedy stated: “Of course the state of the laws actually is that women, even in these kinds of situations, don’t have adequate remedies. All they have is an injunction. They’re not permitted to get any damages, which is one of the matters that’s being addressed in the Civil Rights bill.” *Senate Judiciary Committee: The Nomination of Clarence Thomas to the Supreme Court* (1991).

115. See *Ellerth*, 118 S. Ct at 2270; *Faragher*, 118 S. Ct at 2293.

116. Indeed, the Court seemed to struggle to articulate a meaningful application of agency principles to employer liability for sexual harassment. Having rejected two theories of liability out of hand, the Court still had to modify the only theory remaining, the aided in the agency relation standard, in order to make the theory “fit” into a Procrustean interpretation of Title VII. It may be that the Supreme Court found itself obligated in *Ellerth* and *Faragher* to somehow create an agency theory which would fulfill its proclamation in *Meritor* that agency principles should control.

was negligent in failing to prevent the harassment. As discussed more fully above, most courts did not find an employer liable for hostile environment harassment absent some finding that the employer either knew or should have known about the harassment and failed to promptly correct it.<sup>117</sup> Therefore, *Ellerth* and *Faragher* increase the potential scope of liability for employers to include situations where the employer neither knew about the harassment nor had reason to suspect it.<sup>118</sup>

Moreover, these new decisions clearly establish that an employer is susceptible to vicarious liability even if the harasser is a mid-level supervisor. This change is particularly significant in those circuits, such as the Second Circuit, in which courts previously made a distinction between higher and lower level supervisors and reserved vicarious liability for high-level supervisor harassment.<sup>119</sup> In *Faragher*, the Court noted with approval the rule that employers are automatically liable for discrimination perpetrated by high-level executives such as presidents or executive directors.<sup>120</sup>

Finally, the decisions presume that a plaintiff may recover on a vicarious liability theory even though she has not suffered a negative job consequence. Formerly, an employer was essentially immune from vicarious liability for a supervisor's harassment except in those cases in which quid pro quo harassment was established.<sup>121</sup> That is, an employer was not vicariously liable absent a showing that the plaintiff had been subjected to harassment which was in some way linked to job benefits. *Ellerth* and *Faragher* appear to impose vicarious liability for a supervisor's hostile work environment, subject only to the affirmative defense, even though the plaintiff suffered no negative job consequences.<sup>122</sup>

### C. The Affirmative Defense

The foregoing discussion represents the negative consequences of the decisions for employers. However, a proper reading of *Ellerth* and *Faragher* reveals that the decisions also contain a ray of sunshine, packaged as an affirmative defense, for certain employers. This affirmative defense to liability marks a positive development for employers in the law of sexual harassment.

The affirmative defense is "new" in the sense that the Supreme Court has never before recognized an affirmative defense in Title VII actions. However, the notion of this defense is not entirely novel. Even before the *Ellerth* and *Faragher* rulings, it was generally accepted that the absence of employer negligence served as a defense to Title VII liability for hostile environment harass-

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117. See *supra* notes 40-43 and accompanying text.

118. See *Faragher*, 118 S. Ct. at 2278 (stating that "it makes sense to hold an employer vicariously liable under Title VII for some tortious conduct of a supervisor made possible by his use of supervisory authority. . . In a sense a supervisor is always assisted in his misconduct by the supervisory relationship").

119. See *supra* Section I.

120. 118 S. Ct. 2275, 2284 (1998).

121. See *supra* Section I.

122. See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

ment.<sup>123</sup>

Nevertheless, the recent rulings mark a change in the availability of this defense. The Supreme Court's formulation of the affirmative defense requires more than a showing that the employer was not negligent.<sup>124</sup> The affirmative defense also requires proof that the employee acted unreasonably in failing to take advantage of employer-provided opportunities to correct the harassment.<sup>125</sup> This part of the affirmative defense adds a new element and burden of proof for employers.

In addition, the Court's language arguably imposes a duty to more affirmatively seek out and eradicate sexual harassment, particularly in outlying or isolated workplace locations. In *Faragher*, the Court based its finding that the City had failed to act reasonably to prevent harassment in part on the City's failure "to keep track of the conduct of supervisors" working in "far-flung locations."<sup>126</sup> This suggestion raises some practical problems for employers and could prove troublesome when attempting to invoke the affirmative defense. While it is clear that employers could and should maintain lines of communication regarding sexual harassment with outlying workplace locations, it is not at all clear that employers could radically alter the extent of current supervision in such "far-flung locations." Therefore, the impact of this language, if any, on either an employer's conduct or the availability of the affirmative defense remains to be seen.

#### IV. LIMITING LIABILITY UNDER *ELLERTH* AND *FARAGHER*

##### A. The Importance of Policies

While the Court's rulings in *Ellerth* and *Faragher* represent a significant shift in the analysis of a Title VII case, the decisions are unlikely to have a significant impact on employer behavior. Certainly, the decisions leave no doubt that every employer should adopt and distribute a sexual harassment policy which provides an avenue to report harassment. However, the wisdom of such policies has been obvious for some time. The Court in *Meritor* stressed the importance that an employer provide its employees with a reasonable avenue for complaint.<sup>127</sup> Moreover, even before the Court's recent rulings, an employer's failure to provide a reasonable avenue for complaint had been recognized by some courts as an independent basis for imposing liability.<sup>128</sup> And courts applying the doctrine of apparent authority held that the presence of a policy prohibiting harassment barred a plaintiff's claim on the ground that the policy stripped the supervisor of any apparent authority to harass.<sup>129</sup> These earlier rulings taught the

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123. See *supra* Section I.

124. See *Ellerth*, 118 S. Ct. at 2270; *Faragher* 118 S. Ct. at 2292-2293.

125. See *id.*

126. *Faragher*, 118 S. Ct. at 2293.

127. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 71 (1986).

128. See *Torres v. Pisano*, 116 F.3d 625, 634 (stating that the employer will be found liable if "the employer provided no reasonable avenue for complaint").

129. See *Watts v. New York City Police Dep't*, 724 F. Supp. 99, 106 n.6 (advising employers to

lesson that no employer should be without a sexual harassment policy, and employers taking the counsel of that wisdom almost certainly adopted such a policy before *Ellerth* and *Faragher*.<sup>130</sup>

The recent rulings also reinforce the notion that it is not enough to merely have some semblance of a sexual harassment policy labeled as such.<sup>131</sup> Consequently, in order to avoid employer liability, the policy must be carefully drafted in order to give employers the benefit of the affirmative defense.

In light of *Ellerth* and *Faragher*, the employer's goal in crafting its sexual harassment policy must be to discourage harassing conduct and to encourage the subject of the harassment to make a timely report. By the same token, employers should be aware that plaintiffs' attorneys will attack the policy and search for any possible reason which might excuse the plaintiff's failure to utilize the policy. Consequently, it is critical for an employer to implement a "user friendly" policy which will permit a later finding that the plaintiff's failure to use it was unreasonable.<sup>132</sup>

One of the most critical features of a sexual harassment policy is the designation of a person to whom employees are to report complaints of harassment. A policy which directs an employee to report harassment to her immediate supervisor may be inadequate for certain situations. For example, the employee's supervisor may be the harasser. A limited complaint avenue is also problematic in a situation where the harasser is at a level above the employee's immediate supervisor, as was the case in *Ellerth*. In that situation, an employee may feel that her direct supervisor has no power to correct upper-level harassment. Employers should also be sensitive to the possibility that the harasser may occupy an upper-level position in the company. The policy can avoid creating the appearance of a "David and Goliath" situation by providing employees with several avenues of complaint and encouraging employees to take their reports of harassment directly to the level of management as may be appropriate in their individual situations.

There are other potential features of sexual harassment policies which are

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adopt policies against sexual harassment to remove apparent authority to harass); *see also* Staszewski, *supra* note 31, at 1090 (noting the importance of a sexual harassment policy in avoiding apparent authority liability); Turner, *supra* note 35, at 844 (observing that an anti-harassment policy may assist employers in avoiding liability by dispelling any apparent authority to harass).

130. Ironically, the rulings in *Ellerth* and *Faragher* have opened the door, at least theoretically, to employers proving the affirmative defense even without a policy. Elaborating on the affirmative defense, the Court noted that "proof an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law." *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998). Despite this language, the more advisable course of action for employers seeking to maximize their ability to assert the affirmative defense is to devise, implement and adhere to an anti-harassment policy.

131. The affirmative defense specifically requires that the employer have taken "reasonable care" to prevent the harassment. *See Ellerth*, 118 S. Ct. at 2270; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998).

132. In light of *Ellerth* and *Faragher*, an employer cannot do too much to encourage any and all reports of sexual harassment. The more that the employer knows and the earlier misconduct is brought to its attention, the greater the employer's opportunity to correct the harassment before it results in a tangible job detriment.



the subject of more controversy and debate. For example, some management attorneys advocate policy language which threatens employees with discipline for making false or frivolous reports of harassment. Other attorneys advise their management clients to draft a policy with some type of statute of limitations for reporting harassment or which provides that only current employees may invoke the policy. In fact, it has come to the authors' attention that, in the wake of *Ellerth* and *Faragher*, one management firm is now advising its clients to adopt policy language which makes a failure to report harassment as serious a violation as the harassment itself. These policy features fail to meaningfully add to a policy and may actually risk destroying the employer's ability to claim its affirmative defense. Language which speaks of disciplining the reporter or imposing time limits for reporting may provide an employee or former employee with an excuse for failing to report sufficient to defeat the employer's affirmative defense. It is not unreasonable to expect a plaintiff to argue that she failed to report due to a fear that her complaint would be deemed frivolous or untimely and that she believed she might be disciplined as a result. It is therefore advisable for employers to avoid language or conduct which could later be found to have a chilling effect or offer some other excuse to a plaintiff for not reporting.<sup>133</sup>

#### B. The Importance of Training

If the recent rulings have any impact at all on employer conduct, it may be in the area of training. Historically, employers concentrated their training on supervisors and management-level employees. Goals of the training typically included explaining the types of conduct prohibited, the appropriate supervisory response to such conduct, and the potential penalties to employers for supervisors engaging in the prohibited conduct or for failing to properly react when supervisors learn or should learn of its alleged commission.

The recent rulings suggest that training rank and file employees in the use of the complaint procedure may be as critical as training supervisors to refrain from engaging in harassing conduct or to properly responding to complaints or other notice of inappropriate conduct. As noted above, an employer invoking the affirmative defense must be prepared to show that it acted reasonably to prevent and correct harassment and that the plaintiff failed to act reasonably to prevent, correct or otherwise avoid the harassing conduct.<sup>134</sup> An employer who demonstrates that all employees were made aware that the employer had a policy and were also fully informed as to the procedure for reporting harassment is far more likely to successfully demonstrate its own reasonableness in preventing or correcting harassing behavior. Moreover, an employer who actively trains all

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133. Understandably, employers may wish to discourage false reports of harassment by including a warning against false reports in the policy itself. However, the problem of false reports can be addressed pursuant to a separate and general work rule which requires employees to deal honestly with management. Approaching the issue in this manner, while susceptible to criticism as being overly cautious, ensures that the sexual harassment policy remains free of any language which might permit a claim that reporting was chilled while still allowing punishment for a false or malicious report.

134. See *Ellerth*, 118 S. Ct at 2270; *Faragher*, 118 S. Ct. at 2292.

employees in the use of the policy, and thereby educates its employees in the importance of their role in preventing or correcting the prohibited behavior, will undoubtedly have a persuasive argument that an employee's failure to invoke the reporting procedure was unreasonable, and, therefore, establish its affirmative burden.

There are at least three additional by-products of such training: (i) there is no better way to create a culture which makes sexual harassment disfavored; (ii) there is no better way to encourage employees to utilize the reporting procedure and, therefore, actually give management the opportunity to promptly stop and correct the behavior; and (iii) there is no better way to prove the harasser, and later disciplined employee, was given prior notice of the probable consequences of engaging in the prohibited conduct.

Beyond this, however, there is little more that employers can do to limit exposure to liability for supervisory sexual harassment. In sum, if *Ellerth* and *Faragher* have any impact on employer behavior, it may be in amplifying the message to employers that careful selection of persons to serve as supervisors, an effective sexual harassment policy, and training for all employees regarding the policy are indispensable aspects of doing business.<sup>135</sup>

## V. THE UNANSWERED QUESTIONS OF EMPLOYER LIABILITY

In *Ellerth* and *Faragher*, the Supreme Court meant to clarify the scope of sexual harassment liability for supervisory misconduct, and there is no question that the Court accomplished the goal of resolving some of the confusion regarding the legal basis for employer liability under Title VII.<sup>136</sup> However, the Court's test is neither reasonable nor the bright line rule it purports to be. Consequently, the test will, at least for some time, generate a whole new group of unanswered questions.

### A. Questions of Definition

An employer seeking to avail itself of the affirmative defense must show that the plaintiff was "unreasonable" in failing to use employer-provided measures to prevent or correct the harassment.<sup>137</sup> The Court's rulings are silent with respect to the circumstances in which an employee's failure to report the harassment will be considered "unreasonable." Members of the management bar have expressed concern that such an undefined and amorphous standard will make summary judgment for employers a practical impossibility.<sup>138</sup>

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135. While employers can be careful when screening persons who may be hired or promoted into supervisory positions, it is unlikely that in making an assessment of fitness for duty employers will have any actual indication or knowledge of a potential supervisor's propensity to engage in sexually harassing conduct. Presumably, involvement in any serious, prior misconduct for that employer or another employer if known will disqualify the employee from consideration. In those cases of a tangible job detriment, it is *only* the supervisory hiring decision itself which may avoid the strict liability now imposed.

136. See *supra* Section I.

137. See *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

138. See Dominic Bencivenga, *Looking for Guidance in High Court Rulings Leave Key Terms Unde-*

It is too early to either confirm or deny this prediction. Nevertheless, the lower courts seem to be taking to heart the Supreme Court's message that plaintiffs have a responsibility to use employer policies.<sup>139</sup> The early rulings suggest that a plaintiff will not be easily excused for failing to report.

For example, it has been held that a failure to report is unreasonable where the plaintiff relies only on unspecified fears of repercussion.<sup>140</sup> Moreover, a report may be unreasonable even where the plaintiff alleges a more specific threat. In *Sconce v. Tandy Corp.*, the plaintiff claimed that her supervisor touched her in inappropriate places and made various sexual innuendoes.<sup>141</sup> Additionally, the supervisor threatened to terminate her if she reported his misconduct.<sup>142</sup> The plaintiff knew that her employer had a policy against sexual harassment and also knew where to report misconduct.<sup>143</sup> However, she failed to make such a report and eventually transferred to another location.<sup>144</sup> Her employer first learned of her allegations through the EEOC complaint she later filed.<sup>145</sup> The court found that the plaintiff had suffered no negative job consequence.<sup>146</sup> In fact, she had received a promotion.<sup>147</sup>

Having found no tangible job detriment, the court turned to the employer's affirmative defense. The court first noted that the employer's policy and its response to the plaintiff's allegations were reasonable and adequate.<sup>148</sup> The court

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*fined*, N.Y.L.J., July 2, 1998, at 5 (discussing how the practicing attorneys think that the affirmative defense is not clear enough because the language is ambiguous and the case law provides little guidance).

139. "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Faragher*, 118 S. Ct. at 2292.

140. See *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 481, 492 (S.D.N.Y. 1998) (fear of repercussion did not make failure to report reasonable); *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185, 188 (D.P.R. 1998) (finding that a distrust of manager's and plaintiff's feelings of embarrassment did not make a failure to report reasonable); *Dunning v. Ezell*, No. 97-1061-AH-S, 1998 U.S. Dist. LEXIS 18129, at \*16-17 (S.D. Ala. Oct. 23, 1998) (holding plaintiff's unfounded fears of losing her job and concerns for her family did not make her failure to report reasonable); *Montero v. AGCO Corp.*, No. CIV S-96-1920 FCD DAD, 1998 WL 665103, at \*3 (E.D. Cal. Sept. 15, 1998) (finding that plaintiff was unreasonable in waiting nearly two years to report supervisor's harassment where she claimed she feared retaliation based on supervisor's reaction to employees who called in sick or were late for work); *Mariscano v. American Soc'y of Safety Eng'rs*, No. 97C7819, 1998 WL 603128 (N.D. Ill. Sept. 4, 1998) (finding that plaintiff was unreasonable in failing to make an earlier report where she endured several incidents of harassment before filing an internal complaint); cf. *Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (denying defendant's motion for summary judgment where the workplace was so permeated by severe racial harassment that a failure to report was reasonable).

141. See 9 F. Supp. 2d 773 (W.D. Ky. 1998)

142. See *id.* at 778.

143. See *id.* at 775.

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.* The plaintiff argued that her supervisor promoted her only so that he could be alone with her in management meetings.

148. See *id.* at 778.

then determined that the plaintiff's failure to report, even in the face of a threat of retaliation, was unreasonable:

Effective complaint procedures are designed to protect against precisely such retaliatory conduct. They are intended to divest a harassing supervisor of any power he has over the victimized employee. It follows that a threat of termination, without more, is not enough to excuse an employee from following procedures adopted for her protection. To hold otherwise would render the affirmative defense meaningless. Evidence that procedures are administered fairly and that an employee is not required to report the misconduct to her harasser demonstrates the unreasonableness of the employee's conduct.<sup>149</sup>

Accordingly, the court granted the employer summary judgment.<sup>150</sup> However, it is not at all clear whether all courts would agree that the affirmative defense precludes liability where the plaintiff was threatened by her supervisor as was the plaintiff in *Sconce*. All this is simply to say that the limits of the courts' definition of an "unreasonable" failure to report remains to be seen.

#### B. Questions of Applicability

Another major issue of concern for employers is that both parts of the affirmative defense must be established. That is, to avoid liability, the employer must have acted reasonably to prevent and remedy the harassment *and* the employee must have acted unreasonably in failing to take advantage of the policy.<sup>151</sup> Accordingly, it is entirely possible that an employer will be held liable even though it took all possible measures to detect and correct workplace harassment.

This observation presents a question of the applicability of the affirmative defense to the most common harassment scenario. Assume that an employer has adopted and distributed a sexual harassment policy and that one of its supervisors engages in prohibited conduct. After some time, the plaintiff reports the misconduct via the employer's harassment policy. The employer then investigates the allegations and takes remedial action which ends the harassment. Assuming the victim was not unreasonable in failing to make an earlier report, the question that arises is whether the employer is liable for the harassment which occurred before the plaintiff reported the conduct.

Although a contrary result is not beyond argument, a proper reading of *Ellerth* and *Faragher* dictates that the employer be held harmless in such a scenario. In *Faragher*, the Court emphasized that Title VII is meant "to influence primary conduct" and that the goal of the statute is "not to provide redress but to avoid harm."<sup>152</sup> In fact, the very reason the Court crafted the affirmative defense was to provide employers with an "incentive" to act reasonably in remedying workplace harassment.<sup>153</sup>

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149. *Id.*

150. *See id.*

151. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2293 (1998).

152. *Faragher*, 118 S. Ct. at 2292.

153. *See id.*

Where, as in the situation described above, the employer has taken reasonable and effective measures to investigate and remedy the harassment, the affirmative defense should completely insulate the employer from liability.<sup>154</sup> This is true even if the plaintiff was not unreasonable in delaying her report. It is the rare case where a plaintiff makes an immediate report at the first hint of inappropriate conduct. In almost all sexual harassment cases, the plaintiff, often quite reasonably, refrains from invoking her employer's policy until she is certain that the situation will not correct itself. However, once the plaintiff reports the misconduct, the employer's prompt and effective remedial measures should preclude any liability. Any other rule would defy workplace realities, defeat the policy behind the affirmative defense, and render the defense meaningless.<sup>155</sup>

There are other common scenarios in which the applicability of the affirmative defense is not clear. For example, suppose a supervisor engages in sexual harassment and imposes a tangible job detriment, such as a demotion, on the harassee. Assume further that once the employer is made aware of the sexual harassment and the demotion, the employer immediately corrects the situation by reinstating the employee to her prior position and disciplining the harasser. The question which arises is whether the employer may avail itself of the affirmative defense. A literal reading of *Ellerth* and *Faragher* will likely encourage plaintiffs to believe that the defense is not available.<sup>156</sup> However, this result again seems contrary to the intent of the defense and does nothing to encourage employers to correct workplace harassment.<sup>157</sup>

Finally, there is the question of employer liability where the employee submits to the harassment and receives a job benefit in return. The Court made clear in *Ellerth* and *Faragher* that employer liability would be premised on the presence or absence of a "tangible employment action."<sup>158</sup> Conspicuously, the Court's examples of a "tangible employment action" include only those that can be characterized as job detriments, such as demotion, discharge, or undesirable

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154. Recently, the Fifth Circuit read *Ellerth* and *Faragher* as precluding liability where the plaintiff promptly complained and the employer took prompt remedial measures to end the harassment. See *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-66 (5th Cir. 1999).

155. Several courts have construed the affirmative defense to preclude liability where the employer took prompt and effective remedial action even though the harassment had continued for some time before the victim reported the harassment. See *Montero v. AGCO Corp.*, No. CIV. S-96-1920 FCD DAD, 1998 WL 665103, at \*3 (E.D. Cal. Sept. 15, 1998) (holding that AGCO met its burden because it "exercised reasonable care to prevent and correct" the harassment and plaintiff failed to take advantage of the preventive and corrective measures provided); *Marsicano v. American Soc'y of Safety Eng'rs*, No. 97C78191998 WL 603128, at \*6-9 (N.D. Ill. Sept. 4, 1998) (holding that ASSE exercised reasonable care to prevent and correct the harassment and that the plaintiff failed to take advantage of the preventive and corrective measures of ASSE); *Johnson v. Brown*, No. 94 C6530, 1998 WL 483521, at \*5 (N.D. Ill. Aug. 10, 1998) (stating that the claim failed because the V.A. took corrective measures to prevent the harassment).

156. Pursuant to a literal reading of the Court's rule in *Ellerth* and *Faragher*, an employer's measures to correct a previously imposed tangible job detriment do not absolve the employer of liability. The Court stated that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action." *Ellerth*, 118 S. Ct. at 2270.

157. Obviously, an employer will be less motivated to correct harassment which has already resulted in a tangible job detriment if such remedial measures will not relieve it of liability.

158. See, e.g., *Ellerth*, 118 S. Ct. at 2268; *Faragher*, 118 S. Ct. at 2292.

reassignment.<sup>159</sup> There is simply no mention of the standard of liability if the employee submits to the supervisor's requests and receives a job benefit in return or, alternatively, receives the maintenance of the status quo in return for her sexual favors. Therefore, it seems that *Ellerth* and *Faragher* would allow the employer its affirmative defense in these situations. The rulings seem only to contemplate that a negative job consequence triggers potential strict liability. Consequently, in the absence of a negative job consequence, the affirmative defense is likely available even though this arguably leads to the illogical and asymmetrical result of precluding recovery for the employee who is unable or unwilling to resist a supervisor's advances.

### C. Questions of Damages

#### 1. Indemnification

The Court's reliance on traditional agency principles in *Ellerth* and *Faragher* may resurrect an otherwise defunct issue. It had previously been settled that Title VII does not create individual liability on the part of supervisors who engage in harassing conduct.<sup>160</sup> Consequently, a supervisor was not held individually liable, or even jointly and severally liable with the employer, when his misconduct resulted in employer liability.<sup>161</sup>

*Ellerth* and *Faragher* may provide supervisor liability via an indemnification action brought by the employer. The Court clearly articulated that the standard for employer liability is based in traditional agency principles, and, more particularly, agency principles under the Restatement.<sup>162</sup> Those same agency principles under the Restatement and the common law indicate an agent has a duty to obey his principal's instructions and is liable to the principal for any loss which results from his failure to do so.<sup>163</sup> It is this principle which arguably supports an employer's claim of indemnification against a supervisor whose misconduct results in employer liability under Title VII.<sup>164</sup>

This observation leads to the issue of whether a subsequent action seeking indemnification, an action for impleader or a cross-claim against a state court co-defendant, even if legally cognizable, is necessarily advisable. The wisdom of such derivative actions turns on practical considerations. In the case of impleader or cross-claims brought before the issue of employer liability is determined, strategic consideration become paramount. For example, the effect on the jury of the alleged harasser's presence at the defense table from a practical

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159. See *Faragher*, 118 S. Ct. at 2293.

160. See cases cited *supra* note 18 (collecting cases).

161. See *id.*

162. See *Ellerth*, 118 S. Ct. at 2266; *Faragher*, 118 S. Ct. at 2288.

163. See RESTATEMENT (SECOND) OF AGENCY § 401 (1959) (stating that "an agent is subject to liability for loss caused to the principal by any breach of duty").

164. It is not entirely clear that this aspect of agency law is applicable, however. The Court repeated in *Ellerth* the caution it earlier issued in *Meritor* that "common-law principles may not be transferable in all their particulars to Title VII." 118 S. Ct. at 2266 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986)).

and strategic standpoint could hinder rather than help the employer's cause. An employer, depending on the circumstances, may likely win more jury sympathy via a total disassociation from the alleged wrongdoer. In addition, issues of insurance coverage for individuals of an employer could impact strategic and practical decisions in this area. However, even if indemnification, cross-claims or impleader are not practical possibilities, the discussion and threat of such suits may discourage supervisors who otherwise might take their chances in the belief that only the employer's money is at stake.<sup>165</sup>

## 2. Punitive Damages

As noted above, Title VII provides for punitive damages where the plaintiff demonstrates that the defendant acted "with malice or with reckless indifference."<sup>166</sup> The recent rulings' emphasis on agency principles raises the question of whether an employer may be held liable for punitive damages under *Ellerth* and *Faragher* if the conduct of its agent is malicious or reckless or whether the employer must somehow itself be culpable before it must answer for punitives.

Presumably, principles of the common law of agency will control. However, the common law on this issue is not uniform. In some jurisdictions, the principal is held liable for punitive damages merely upon a showing that the conduct of its agent merits such an award.<sup>167</sup> In other jurisdictions, courts require that, since liability is derivative or vicarious, the principal must be directly implicated in the misconduct either by ratifying, authorizing or participating in the misconduct.<sup>168</sup>

As applied to employer liability under Title VII, courts should conclude that an employer is not liable for punitive damages absent some showing of its own culpability in the harassment. This is true even if the employer is held liable for compensatory damages as a result of a supervisor's misconduct. The goal of punitive damages is to punish, and this goal is lost if punitives are imposed on an employer who is implicated in the harassment only via strict agency principles. Moreover, the affirmative defense indicates that employers who take reasonable measures to prevent and correct harassment should be rewarded for their effort. It would be contrary to this notion if courts were to hold an employer liable for punitive damages, despite taking preventative and corrective measures, based merely on the undetected harassment of one of its supervisors. While the resolution of this issue remains to be seen, employers should be relieved of liability for punitive damages absent some reason to implicate the employer in the harassment.<sup>169</sup>

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165. Supervisors may also be subject to individual liability under state law. See Bertrand C. Sellier & Felice J. Batlan, *Individual Liability for Employment Discrimination*, N.Y.L.J. January 4, 1996, at 1.

166. 42 U.S.C. § 1981a(b)(1)(1994).

167. See 22 AM. JUR. 2D, *Damages* §§ 257, 258.

168. See *id.*

169. Pre-*Faragher* and *Ellerth* case law supported such a result, at least to the extent that the harasser was a mid- or low-level supervisor. See *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-44 (5th Cir. 1996) (holding that an employer was liable for compensatory damages but not punitive damages flowing from the intentional discrimination of its supervisor absent evidence that the employer "knew or should have known" of the supervisor's discrimination). However, the Fifth Cir.

## CONCLUSION

The Supreme Court's rulings in *Ellerth* and *Faragher* reshape the standards of employer liability for supervisor harassment. As a result, the rulings change the analysis of a Title VII claim. For no reason that the authors can discern, the determination of employer liability now incorrectly focuses on the type, not degree, of harm suffered by the victim. Despite this change in the legal landscape, there is little more that employers can practically accomplish to limit their liability for sexual harassment. For that reason, the decisions are somewhat disappointing to conscientious employers willing to take all reasonable steps in order to eradicate sexual harassment in their workplace and avoid liability. Nevertheless, the rulings re-emphasize the importance of well drafted anti-sexual harassment policies, sexual harassment training for all employees, and prompt investigations and appropriate responses to allegations of sexual harassment.

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cuit recently re-examined this issue. The Court determined that, in light of *Faragher* and *Ellerth*'s imposition of vicarious liability for low-level supervisors, an employer could be held liable for punitive damages for the conduct of low-level supervisors even though it had no knowledge of the harassment. See *Deffenbush-Williams v. Wal-Mart*, 77 Fair Empl. Prac. Cas. (BNA) 1699 (5th Cir. 1998).